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UNITED STATES.

OCTOBER TERM 1901.

THE UNITED STATES, Appellant, vs. M. R. PATRICK, and JESUS ESCOBAR, Appellees.	Appeal from the Court of Private Land Claims, Territory of New Mexico.

SECOND REPLY BRIEF OF APPELLEES.

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THE OPTIC PRINT, E. LAS VEGAS

IN THE

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UNITED STATES,

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THE UNITED STATES, Appellant. vs. M. R. PENDELL and JESUS ESCOBAR, Appellees.	Appeal from the Court of Private Land Claims. Santa Teresa Grant In New Mexico.

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Appellants in their brief in reply undertake to answer the briefs of appellees in some regards. We will not, however, undertake to reply to all they have said in their reply, as we deem our former briefs sufficient.

As far as can be learned by examination of all the laws and decrees which can be found, as well as the histories of Mexico and New Mexico, the district of Paso del Norte from the early part of the eighteenth century to the time of the Mexican independence was generally recognized to be the province of New Mexico, although there seems to have been at times a doubt whether it was in Chihuahua or New Mexico. By the act of the Mexican congress of July 6, 1824, Chihuahua was made a state of the Mexican federation, and New Mexico a Territory in the same.

Dub. y Loz. Leg. Mex. 709-10.

By an act of the same congress of July 27th, found in the same compilation, p. 210 No. 413, the boundaries of Chihuahua were fixed so as to include the town of El Paso within it; the northern boundary of the state running from the town from east to west

It is claimed by appellants in the 4th subdivision of the reply brief, that the case of U. S. vs. Chouteau, 9th Peters 137, and U. S. vs. Chouteau, 9th Peters, 147, and Delassus vs. U. S., 9th Peters, 116, are not in point as to a lieutenant-governor having the power to make a grant, because they say in New Mexico or Mexico he was not a sub-delegate, and that in these cases he was directed by the governor to make the grant. We do not so understand those cases. If he had no such power by virtue of his office, the governor could not confer it. The supreme court in those cases expressly state that the lieutenant-governor was a sub-delegate, and that he had the right to make an imperfect grant independent of any authority from the governor, but that to be perfect, the grant should be confirmed by the governor intendant, but they did not hold that the authority of the governor was necessary in order to make an imperfect grant, but on the contrary, they held that he had such authority, and afterwards in the case of Menards' Heirs vs. Masey, 8th How. 301, they again re-affirm this doctrine. By the general law of Spain, governors were authorized to appoint lieutenant-governor in their jurisdiction within the different districts. What was a sub-delegate? The governor of a province, or the intendante of a province, both of whom were appointees of the king, were recognized as the delegates of the king. They were authorized to appoint subordinates in the different districts of their jurisdiction, having therein the powers they possessed, and by virtue of such second appointment or delegation, they were known or

recognized as lieutenant-governors or sub-delegates. Sometimes they were called Lieutenant-governors, sometimes they were called sub-delegates.

The law in Louisiana at the time of the grants referred to in the said two cases of Chouteau's Heirs and the cases of Clarke and Delassus, all found in 8th and 9th Peters, was exactly the same as that in the republic of Mexico. By a reference to White's Rec. Vol. 2, p. 469, it will be seen that as early as Aug. 29th 1797, the entire ordinances de intendantes, establishing and furnishing instructions for the intendantes of New Spain, which contained 306 articles, was at that time in force, in Louisiana, in all of its parts; in a communication of that date, Morales, the acting intendante, furnished a copy of those instructions to the governor, and gave a copy therein of article 81, which is there better translated than in Reynolds, at page 60. In that article express authority is recognized in the sub-delegates to make confirmations of grants which may be applied for in accordance with the royal instructions of Oct. 15, 1854, and it was under this authority that those sub-delegates were authorized to make imperfect grants. By article 10 of said regulations of intendant, Reynolds, 60, it is provided that the political and military government of New Mexico shall remain in existence, and consequently they are to continue with the causes of justice and police, united under the military commands in their respective territories or districts, with the exception of what corresponds to "propios y arbitros" which last words are translated in Reynolds "municipal domains", but which mean lands

and estates belonging to a city or civic corporation to support of their expenses, and the right to tax certain things in a civic corporation or city to raise revenue; otherwise it means the ways and means given a city, town or village to raise means for their expenses, and does not refer in any manner to public domain. Said Sec. 10, as translated by Reynolds, says: "and with the view of securing in all that kingdom the success of the important object referred to in the foregoing articles (Art. 9) by reason of the sub-delegations it provides for, I command that the several intendants likewise make them in the said governors."

It will be noticed that the governors of the various provinces were not in any manner abolished, but on the contrary, the intendant were required to make them sub-delegates, and this is all of the authority which existed in Louisiana on the same subject, as the same law prevailed there, at the time of making the grants adjudicated in those cases cited. The word governors may have referred to lieutenant-governors as well as to the principal governor. Sec. 10 recognizes sub-delegates of the intendant and their requirements that the governors shall also be made sub-delegates by the intendants. This evidently must have referred to and included lieutenant-governors, otherwise there was no law in the case of Chouteau vs. U. S. 9th Peters (two cases,) and in the cases of Clarke vs. U. S. 8th Peters, and Delassus vs. U. S., 9th Peters and Menards' Heirs vs. Massey, 8th How., all before cited, which would have justified the statement that the lieutenant governor was a sub-delegate. At least we can

find none. The laws were the same; the officers must have been the same. The officers with the same designation and under the same law exactly, performed the same duties and did the same acts, both in upper Louisiana and in New Mexico or Chihuahua, except that in New Mexico there never was an intendant who undertook to exercise any authority. Evidently the regulations in respect to intendants was never promulgated in New Mexico; besides New Mexico never was included in any one of the twelve intendencias, but by Article 16, it was provided that New Mexico should continue with its existing government, both *political* and *military*, except what pertained to the property of cities, towns and villages, and their right to tax for purposes of paying their expenses, and what belonged to the community property of pueblos. These embraced in the exception were exclusively under the jurisdiction of intendants subordinate to the supreme treasurer; which implies everything not embraced in the exception remained vested in the governors.

Appellants in their brief say that the burden of proof is on the appellees to show that the lieutenant-governor was a sub-delegate, We think that is shown already by the fact that the law in Louisiana and Mexico are exactly the same, and that the officers performed their duties in exactly the same way. Under the decision in the Louisiana case (or Missouri cases) of Chouteau vs. U. S., the supreme court did not give any weight whatever to the direction of the governor, but stated emphatically that the lieutenant-

governor was a sub-delegate, and had a right to make imperfect grants. He was a sub-delegate because he was the subordinate, or the governor-intendant, who was the delegate of the King, and for no other reason. Appellants in their argument have insisted that there was a practice in Sonora different from that in Paso del Norte, which may be true, but it does not change the facts.

The attention of the court is called by appellees to another case of a grant made by the lieutenant-governor at Paso del Norte for land a few leagues above that town on the opposite side of the river from the property in question. The grant was made to Juan Antonio Garcia; that grant, like the one in question, was destroyed by the American troops when they occupied Paso del Norte in 1846, and proceedings, similar to those in this case. were had before the same judge as in this case. Those proceedings being had partly in the year 1849, and it was decided by the surveyor general in considering the transcript of those proceedings that the grant was made to Juan Antonio Garcia in the year 1822 or 1823 by Jose Ordas, the lieutenant-governor at El Paso; that owing to the destruction of the public archives, where such documents were ordered to be kept, at that place in the year 1846 by the American troops, it was impossible for the grant itself or a copy thereof to be presented by the claimants. This grant was the claim of Hugh Stevenson vs. U. S., private land claim No. 32, corrected No. 6, and was confirmed by the act of congress of June 21, 1860 as claim No. 6. The fol-

lowing is a copy of the decision given by the surveyor general in that case which substantially states all of the facts; showing the case to be identical with the one in question in every respect.

SURVEYOR GENERAL'S OPINION.

contained in House of Representatives, report No. 457, 35th congress, 1st, session May 29th, 1858.

Hugh Stevenson et al, vs. the United States. Grant.

"The above case was set for trial on the 1st day of December, 1856.

"In the year 1805, Juan Antonio Garcia petitioned Joaquin Real de Alencaster, the governor of the province of New Mexico, for a grant of land in what is now the county of Dona Ana, to extend from the Bracito, on the Rio Grande, to the marsh or lake of Trujillo, promising to build a house, erect enclosures, and cultivate the soil; maintaining fifteen men there at his own expense, for the purpose of protection, until travel and the benefits to be derived from working the mines in the adjoining mountains should attract a sufficient number of persons to form a permanent settlement.

"On the 4th day of August, 1805, Juanquin Real de Alencaster the governor of the province to whom the petition was addressed, decreed that the grant would be made whenever settlement should be established in the vicinity of the land petitioned for. On the 29th of November, 1816, Juan Antonio Garcia again petitioned Bernardo Bonavia the commandant general of the state of Durango, for a grant of the land of which he had been in possession since the year 1805, and containing the same boundaries set

forth in the petition made by him in that year, stating that there were several individuals of El Paso who had volunteered to accompany him in the formation of a settlement, and also promising to plant certain lands for the Apache Indians, and furnish them with provisions from the crops he might raise at the above mentioned place, for the purpose of keeping them at peace.

"On the 14th of April, 1817, the commandant general referred this petition to the lieutenant-governor of El Paso, requiring him to report thereon. On the 29th of June, 1819, Jose Ordas, the lieutenant-governor of El Paso, reported in favor of the petition.

"On the 17th of July, 1817, the commandant general of Durango returned the petition to the lieutenant-governor of El Paso, requiring him to enclose the list of persons who were desirous of accompanying Juan Antonio Garcia in the formation of the settlement referred to in his petition, and to state the extent of the land petitioned for, its distance from the nearest settlement, its resources, &c., and if the settlement and residence of the judicial and ecclesiastical officers could be formed in the centre of the land petitioned for. On the 30th of August the lieutenant-governor of El Paso reported that the land contained in length about three leagues, and in width from one-fourth to over one league; that there was an abundance of water and pastures, and offered every facility for cultivation; that there was difficulty in establishing the settlement and residence of the officers in the centre of the land asked for, and that it was about fifteen leagues distant from the last houses of the town of El Paso, and enclosing the list of those persons who had volunteered to accompany Garcia in the formation of the settlement.

"On the 12th of September, 1817, Juan A. Garcia addressed a petition to the lieutenant-governor of El Paso stating that, as the circumstances which existed at the time he applied for a grant to the land in question had changed, he prayed that no further action should be taken in the premises until requested by him.

"On the 18th of February, 1820, the said Garcia again petitioned the governor of New Mexico, stating that those who had volunteered to accompany him in the formation of the settlement had given up the idea of going, on account of the many restrictions placed upon the grant, and that, as he had been occupying the land for eleven years, he hoped that this circumstance would be no reason why the grant should not be made to him alone, and still promising to maintain a small number of armed men at his own expense, and build houses, erect enclosures, and cultivate the land which was not occupied by the Indians, concluding his petition by praying that the grant be made to him, if convenient to the service of the king.

"On the 18th of Aug. 1820, Facundo Melgares the governor of New Mexico, declined making the grant on a supposed want of authority in the premises, and referred the petitioner to the proper authorities in the case.

"On the 28th of July, 1821, the said Garcia again petitioned the commandant general of Durango for a grant of the Bracito tract, recapitulating all the steps he had taken in the premises, and the action of authorities from 1805 up to that date.

"Immediately following this petition is to be found a statement, made by the comptroller of the state of Durango, recommending that the grant be made, and that the testimony of witnesses be taken in order to ascertain whether the land petitioned for

was severed or not from the public domain, and in case it was not, that an attorney general be appointed to superintend the interest of the public revenues; and that a report be subsequently made, in order to ascertain the resources of the land, and its adaptation to the raising of stock and cultivation.

"On the 17th of January, 1822, the above proceedings were transmitted to the first justice of the town of El Paso with instructions to comply with the request contained in the statements of the comptroller.

"On the 18th of April, 1822, the justice of El Paso proceeded to take the testimony of witnesses as to whether the land was public domain or not, and it was proved by said testimony that the land in question had not been severed from the public domain but was public land. The above proceedings were then transmitted by George Juerena, the justice aforesaid, to Don Jose Maria Cordova of the vicinity of El Paso, who on the 19th of April of the same year, reported the extent, locality, resources, &c., of the land petitioned for. In order to comply with all the requirements contained in the statement of the comptroller, George Juerena, the justice aforesaid, appointed Julian Bernal as attorney to superintend the interests of the public revenue, and transmitting all the proceedings to him required him to report on such matters as appertained to his duties, as such attorney. The report of the attorney aforesaid does not appear in full in the documents field in this office, having been torn off at some period unknown to the claimants.

"A certificate, given by the second justice of the cantonment of Bravos follows the above, certifying that they are true copies of all the papers which could be found in the archives of El Paso relative to the Bracito grant of land, and which remained after

the destruction of the archives by the United States troops, in the year 1846.

"On the 30th day of March, 1829, Francsco Garcia y San Juan, son of Juan Antonio Garcia, who departed this life in the year 1828, addressed a petition to the prefect or justice of the opposite side of the River Bravo requesting him, after reviewing the testimony presented to him, showing the occupancy of his father from the commencement of the present century up to the time of his death, in the year 1828, and that a grant was made to him according to law, that he declare him a legitimate owner of the Bracito tract of land. On the 13th of February, 1849, Francisco Garcia y San Juan petitioned the justice of El Paso to cause certain individuals, therein named, to appear before him to answer the interrogatories contained in the petition as to whether the witnesses were acquainted with his deceased father, and if he resided at the Bracito from the commencement of the present century up to the time of his death; if they knew that at his own expense he cultivated the lands of El Bracito during his lifetime, and if he was lawfully placed in possession of the land by the competent authorities of the country; and that if he (the son) abandoned the land on account of indolence, or on account of the invasion of the Indians.

"The answer to these interrogatories shows that Juan Antonio Garcia occupied the Bracito lands during the time mentioned; that he had cultivated the same at his own expense; that he was lawfully placed in possession by the competent authorities of the land; that some of the witnesses had the original documents granting the possession in their own hands; and that Francisco Garcia y San Juan abandoned the land on

account of the constant attacks of the Indians and the hourly exposure of his life.

"On the 17th of March, 1849, Juan Maria Ponce de Leon, political chief of the cantonment Bravos, at the request of Francisco Garcia y San Juan, certified that Juan Antonio Garcia deceased, petitioned for a grant of land at the Bracito; that he resided there for many years, cultivating the soil and raising stock; that almost at his own expense, he kept the neighboring Indians at peace, and rendered many important services to travelers,and even to the entire nation, until the hostilities and incursions of the Indians drove him away; that at a subsequent period, a grant of land was made to one John Gill in the vicinity of El Bracito, and that the limits of the Garcia's lands were always excepted from being granted to others, and that he knew all of those facts, having been appointed a commissioner by the Mexican government to examine the land petitioned for.

"Further interrogatories were taken in the year 1849 showing that a grant was actually made to Juan Antonio Garcia by Jose Ordas who was at the time lieutenant governor of El Paso, and testifying to the boundaries of the grant.

"It is also proven, that at the request of Francisco Garcia y San Juan, the United States troops, during the war with Mexico in the year 1846 when they took possession of the town destroyed a large portion of the public archives of El Paso, where the originals of all grants were required to be deposited, thereby preventing the claimants from procuring all of the documents necessary to the establishment of their claims * * * *

"It is not necessary for this office to examine into the validity of the testimony taken by the claimants in support of their claim, or whether it is taken in ac-

cordance with the requirements of the usage in taking testimony in a foreign country, to be used within the United States, there being no instructions to this office other than to receive the testimony presented by the claimants, and the question is, therefore, submitted for the deliberations of congress.

"From the facts set forth in the testimony presented, it appears that Juan Antonio Garcia was in possession of the Bracito tract of land in the year 1805, and that he and those purporting to be his heirs and their assigns have continued in possession of the same up to the present day.

"The testimony also shows that a grant was made to Juan Antonio Garcia in the year 1822 or 1823, by Jose Ordas the lieutenant-governor of El Paso; that owing to the destruction of the public archives, where such documents were ordered to be kept, at that place, in the year 1846 by the American troops it was impossible for the grant itself or a copy thereof to be presented by the claimants, although diligent search was made for it without success.

"The claimants have not presented any testimony to prove that the present claimants are the legal heirs and assignees of Juan Antonio Garcia, deceased. It is the opinion of this office that the case is one covered by the treaty of Guadalupe Hidalgo of 1848 and sustained by the decision of the supreme court of the United States in the premises, and that therefore the grant made to Juan Antonio Garcia by the authorities of the Mexican government, in the year 1822 or 1823, is a good and valid grant; and as no claim of title is presented to show that the present claimants are the legal heirs or assigns of said Juan Antonio Garcia, it

is the opinion of this office that the grant should be confirmed to Juan Antonio Garcia alone.

"The case is, therefore, transmitted to the proper department at Washington for the action of congress in the premises."

(Signed) WILLIAM PELHAM,
Surveyor General."

Counsel for appellants allege that appellees have shown no case of a grant by a lieutenant-governor at El Paso del Norte and say that during their investigation through the records of hundreds of grants they have not found one purporting to have been made by a lieutenant governor at El Paso del Norte or any lieutenant-governor except Juan Paiz Hurtado in 1835, who as a lieutenant governor at Santa Fe at that time, while the governor was visiting El Paso del Norte, made some grants, and which grants they allege were revoked by Governor Cruzat. Those grants were not revoked by Cruzat because of the want of authority in a lieutenant governor to make them—in fact he gave no reason for his revocation. If Hurtado had no authority, Cruzat would have declared them to be void and not revoked them. We submit that the above mentioned case of Hugh Stevenson and the surveyor general's opinion in the same above quoted show a grant made by a lieutenant-governor at El Paso del Norte which was recognized as valid and confirmed by congress as private land claim No. 6, June 21, 1860; the proceedings therein being printed in H. R. document, 35th Cong. 1st session, p. 24,

report 457, and shows that the papers in such case had been properly placed in the archives at El Paso which was the proper place of archives of "all grants" in that district.

From El Paso del Norte north up the Rio Grande there were no settlements prior to the Mexican independence until Socorro was reached, a distance of about 180 miles; all of which country between said two places was frequented at all times by hostile Indians and subject to their incursions. The case of Stevenson and also our case show that the Indians interrupted the settlements on both those grants although they were not far from Paso del Norte. It was doubtless on account of the Indians that no more grants were made north of El Paso prior to the Mexican independence. The Stevenson grant and ours being the only two of which there is any record of having been made prior to that date. What may have been made below the town of El Paso in the present state of Texas east of the river and on the west side of of the river we have no knowledge because such cases did not come before either the surveyor general of New Mexico or the court of private land claims, but we insist that the Stevenson case is directly similar to the case in question in every respect. It was made by a lieutenant governor, the grant was placed in the archives at El Paso, which that case says was the place where "all archives" of grants in that jurisdiction were kept. That case shows that the archives were destroyed by the American troops in

1846, and that they were quartered in the rooms where the archives were kept; that subsequent thereto the owners of the grant of land applied to the local judiciary at El Paso del Norte in 1849 to have their grant titles re-estabilshed or perpetuated, or new evidence of it given, and that proceedings were had similar to those in this case except with not quite as much formality; that grant, on those papers, was presented to the surveyor general under the act of 1854, and the 8th section thereof, and was by him recommended for confirmation to congress, and was by congress confirmed on exactly similar title papers to those presented in this case. Certainly that case shows that the lieutenant governors were in the habit of making grants; there possession had not been held as long as in this case. The proceedings in that case also were not as strong as in this case; they were taken in the year 1849 after the treaty of Guadalupe Hidalgo, the most of the land in that case being on the east bank of the Rio Grande, and not within the Gadsden purchase, while all the land in the Santa Teresa case was in the Gadsden purchase.

In regard to the effect of the decisions of the Spanish courts or Mexican courts, in matters of this nature, the attention of the court is called to the case of Keene vs. McDonald, 8th Peters, 310, the court say: the petition alleges that the proceedings under which the second sale was made were irregular and unlawful.

"Should it be admitted that it was competent for the plaintiff to impeach the adjudication, and show that the proceedings were irregular and unlawful, the record contains no offer at the trial to show any irregu-

larity or illegality in those proceedings; they must at least be taken as prima facie evidence of a judicial proceeding to pass the title of the land according to the course and practice of the Spanish law in that province." * * * * * * * * * *

"The adjudication having been made by a Spanish tribunal after the cession of the country to the United States, does not make it void; for we know historically that the actual possession of the territory was not until sometime after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal having jurisdiction of the case, and rendered whilst the country, although ceded, was, defacto, in the possession of Spain, and subject to Spanish law."

We have shown by this quotation of the opinion of the surveyor general in the case of the Stevenson grant confirmed as private land claim No. 6 so corrected from its original file No. 32 by the first clause of the act of congress, June 21, 1860, as well as by the present case what was the practice and procedure in such cases at Paso del Norte, and that Paso del Norte was the place where the archives of "all grants" were kept which were made at Paso del Norte.

These two cases—that is, the one under consideration, and the Stevenson case, being exactly alike in every particular, except that congress confirmed one, certainly show the practice which existed at Paso del Norte in regard to making grants in that vicinity, and also the practice which prevailed in order to perpetuate the evidence of the existence of the grant and its extent and occupation when the papers were lost. They show that there was a lieutenant governor at that point, and

that he exercised such powers; it also shows that there was some doubt as to whether that district was in New Mexico or in Chihuahua, but there is no doubt shown as to the right of the lieutenant governor to make the grant. These are the only two grants of which there is any record as to having been made in that district of country prior to the independence of Mexico except the John Gill case (cessna) made by the town authorities of El Paso del Norte. There is one other which was made about the year 1840 to the colony of Dona Ana under the regulations established by the State of Chihuahua in which the governor of that state did not participate. That and the Gill case were under the Mexican rule. Our case and the Stevenson case were under Spanish rule.

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